

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

ELMER'S CRANE AND DOZER, INC.¹

Employer

and

CASE 7-RC-22085

LOCAL 324, INTERNATIONAL UNION OF
OPERATING ENGINEERS, AFL-CIO

Petitioner

APPEARANCES:

Nathan D. Plantinga and Craig A. Miller, Attorneys, of Grand Rapids, Michigan, for the Employer.
John Cobe, of Walker, Michigan, for the Petitioner.

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter referred to as the Act, a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:²

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

¹ The Employer's name appears as corrected at the hearing.

² The parties filed briefs, which were carefully considered.

3. The labor organization involved claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

The Employer is an excavation contractor engaged in earth moving, asphalt paving, aggregate production, and redi-mix cement sales at and out of its yards in the Michigan cities of Traverse City, Manistee, Ludington, Big Rapids, and White Cloud. The Petitioner seeks to represent a unit of 106 drivers assigned to the 5 sites. The Employer, while agreeing to the appropriateness of a multi-location unit, contends that the smallest appropriate unit must include 238 employees consisting of 100 operators and 32 laborers in addition to 106 drivers.³ There is no history of collective bargaining with respect to the employee groups at issue.

A driver is normally assigned to operate a particular vehicle, which he is responsible to fuel daily and on which he is to perform daily pre-trip inspections. The Employer utilizes eight types of trucks -- redi-mix cement, flow boys, gravel trains, tandems, transfer tandems, cranes, low boys, and pick-ups. Departing his home-base yard, a driver spends his day retrieving and delivering product by traveling back and forth among the Employer's nine mining pits, customer jobsites, and the yard. Operators run heavy equipment, such as the dozer, backhoe, shoveler, loader, dozer, excavator, scraper, rigger, and crane, principally at jobsites and pits. The record does not disclose whether operators, like drivers, are typically assigned a particular piece of equipment. Laborers work at jobsites and their home-base yards. Details of their functions and skills were not adduced at the hearing.

The Manistee, Ludington, Big Rapids, and White Cloud locations are each headed by a plant manager, who is the sole on-site chief of the drivers, operators, and laborers attached to that yard.⁴ These four plant managers make job assignments, prepare work schedules, and recommend hiring and discipline to the Employer's president, Russell "Butch" Broad.⁵

³ The parties stipulated to the numerical totals just cited, as well as to the following breakdowns per location: Traverse City (70 drivers, 92 operators, 30 laborers); Manistee (13 drivers, 6 operators, 2 laborers); Ludington (10 drivers, 0 operators, 0 laborers); Big Rapids (4 drivers, 1 operator, 0 laborers); and White Cloud (9 drivers, 1 operator, 0 laborers). The foregoing statistics include about 20 operator/foremen employed at Traverse City, as to whose eligibility the parties disagree on both supervisory and community-of-interest grounds.

⁴ The Employer declined to stipulate to the supervisory status of the plant managers.

⁵ Based thereon, I find that the plant managers at these four locations are statutory supervisors. The parties stipulated, and I concur, that President Russell "Butch" Broad, Vice Presidents Todd Broad, Troy Broad, and Tanya Wildfong, Human Resource Director Tawni Gilmer, and Co-Owner Gary Holcomb, individuals who comprise the Employer's management team, are supervisors under Section 2(11) by virtue of their authority to hire, fire, and direct the workforce.

The Traverse City location, which employs the greatest number of employees at issue and houses the corporate administrative offices, has a more layered chain of command. Operators and laborers working off-site at the pits or yard are directed by their working crew leaders, called operator/ foremen, who in turn execute instructions from dispatchers and estimators. Drivers receive job assignments directly from dispatchers. Dispatchers are responsible for scheduling drivers, and apparently operators and laborers as well. Overtime is authorized for drivers by dispatchers, and for operators and laborers by operator/foremen. Traverse City drivers report work problems to their dispatchers and also directly to President Russell Broad.

The Traverse City location also employs about four plant managers, who oversee the product divisions of concrete, asphalt, excavation, and rigging. According to a chart of the Employer's supervisory hierarchy, Traverse City plant managers are superior to operator/foremen and equal to the plant managers who superintend the outlying four locations. With input from his management team, Russell Broad makes the final decisions at all five locations in the areas of hiring, discipline, layoffs, and transfers.⁶

The Employer's premier argument for the propriety of a wider unit is the overlap of duties among the drivers, operators, and laborers. One Employer witness estimated that in any given month at the Traverse City location, 75% of the drivers spend time working in another classification, and over 50% of the operators and laborers spend time working as drivers. These conclusionary percentages reflect how many employees work outside their classification as defined by the Employer. The definition is significant. For example, the Employer classifies a driver's maintenance tasks, such as fueling and greasing his truck or using a jackhammer to chip dried cement from a redi-mix truck drum, as laborers work. The percentages fail to clarify how often or why employees work outside what the Employer defines as their classification.

An Employer exhibit attempts to quantify the year-to-date hours that each driver, operator, and laborer has worked in each of the three classifications. The document (Exhibit 4) shows a high degree of cross-classification work. However, the Employer witness who prepared the document for purposes of this hearing admitted that she misinterpreted some underlying data, which caused the entire exhibit to overstate operator hours and understate

⁶ Although insufficient evidence was presented to permit a finding as to the supervisory status of dispatchers, the parties agreed that they should be ineligible to vote. I concur that dispatchers may be excluded from the unit on community-of-interest grounds. The parties have opposing views of the eligibility of operator/foremen, the Employer contending that they are eligible as leaders and the Petitioner arguing that they should be excluded as supervisors. Because the approximately 20 operator/foremen comprise less than ten percent of the larger proposed unit, their supervisory status was not litigated. The duties of Traverse City plant managers were not delineated in testimony nor inferable from the Employer's organizational chart. Assuming from the chart that their authority matches that of the plant managers at the four satellite locations, they, too, are ineligible as supervisors.

driving hours. The existence of this flaw was confirmed by two drivers, who testified from personal knowledge that the exhibit's reflection of their hours was inaccurate.⁷

Another Employer exhibit on the subject consists of 18 computerized timecards for October 11, 2001, the first day of the hearing. The Employer offered testimony that these selected documents are representative of its operation. The samples show that on October 11, eight operators and laborers did operator and/or laborer work, but no driving.⁸ Entries for another five operators demonstrate a mixture of operator and laborer work that day, plus from 30 minutes to 2 hours with a tandem-trailer or truck-with-trailer. An Employer witness explained that an operator timecard showing such driving most likely reflects the operator's commute with his heavy equipment to his destination jobsite.⁹

The remaining five entries in the exhibit are most illustrative of the Employer's position. Operator Greg Herman spent two hours operating heavy equipment called a shoveler and nine and a half hours on the same job driving a tractor-with-train. Driver John Marsh operated a loader for two hours and spent eight and a half hours on the same job driving a redi-mix cement truck. Duane Gauthier, listed on one exhibit as a driver but appearing on another to be an operator, spent nine hours on undisclosed laborers work and two hours on the same job driving a Ford F900 truck. Operator David Finfrock devoted eight hours to operator and laborer tasks and two hours on the same job driving a Ford F900 truck. Laborer Charles Benz worked nine hours as a laborer and four hours on the same job driving what the exhibit suggests was a tandem dump truck.

As noted, the Employer adduced testimony that the time records just described are typical of the degree of cross-classification work throughout its operation. A Traverse City driver testified that operators and laborers drive trucks to move product when no driver is available, which he said occurs at Traverse City a couple of times per week.

As the timecard exhibit suggests, drivers sometimes load product onto their own trucks using heavy equipment normally used by operators. This occurs for two main reasons: they are retrieving product from the two out of nine pits that are unmanned, or they are among the four to six drivers at Traverse City who work a late shift, arriving at manned pits whose operators have left for the day. One driver testified that he spends 5 hours of a 60-hour week loading his

⁷ The exhibit showed 1061 operator hours and 0 driving hours for driver James Trumbull, and only 289.75 driving hours for driver Mark Clark.

⁸ See the entries for operator Dan Harrigan, operator/foreman Joseph Herman, operator George Kott, laborer Robert Budreau, operator Robert Beeman, laborer Ronald Schram, operator Randall Brown, and operator Del Harris. The records show that when they did both operator and laborer work that day, it was for the same customer on the same job. The exhibit also shows that operator Dan Harrigan did only operator work that day.

⁹ See entries for operators Terry Mason, Rick Broad, Raymond Slade, Brian Wortley, and William Jury. The record does not reveal whether these operators were drivers of, or passengers in, the trucks.

truck at unmanned pits; using a loader takes him 15 minutes per load. The same driver testified that the Employer strictly enforces a rule that drivers must remain in their vehicles at manned pits at which loaders are being operated. Drivers who seldom retrieve product at unmanned pits, and redi-mix drivers whose product is poured through a chute, do not have much, if any, occasion to do their own loading. However, there is no evidence as to the number of drivers in those categories. Ordinary business records do not necessarily reflect the true prevalence of drivers' loading hours, because some drivers report loading as driving time on their daily timecards or computer entries.

The Employer sometimes allows drivers to volunteer for more lucrative laborers work payable at the prevailing wage on publicly financed projects subject to the Davis-Bacon Act. Drivers must be qualified to perform the prevailing wage work, and not all of the Employer's drivers are. The record does not disclose how many are qualified, nor how many laborer hours attributed to drivers are the result of this volunteerism. Redi-mix drivers sometimes help pour and prepare septic tanks. There is no indication in the record of when, why, or how often this happens, nor into what classification septic tank work normally falls.

In the past year, about 4 of the Employer's 106 drivers were permanently transferred to operator or laborer positions. At least two of these transfers were requested by the employee; the reasons for the other two transfers were not revealed. A driver who suffered a vehicular accident worked as a laborer for 7 to 10 days, apparently at his own request. This same driver began his career with the Employer doing non-driving work. Another individual who left the Employer in 1999 as an operator was rehired this year as a driver. No further evidence regarding transfers was adduced.

Contact among employees in different classifications takes place at safety meetings, training sessions, and Employer-sponsored social events such as holiday parties and summer wiener roasts. An Employer witness observed that there is greater contact among drivers, operators, and laborers at asphalt than at other sites, because the danger of the work requires closer coordination. A driver testified that he has little contact with employees in other classifications beyond handing his delivery ticket to the operator/foreman at a pit or jobsite.

The Employer imposes no educational requirements on persons in the disputed classifications. As far as the record reveals, none of its employees possess formal journeyman credentials and none are enrolled in apprentice training programs. The Employer requires all of the disputed employees to have class B commercial driver licenses. Some employees also possess class A licenses and/or specific endorsements, but those accreditations are not uniformly required. Federal law mandates that any individual who works regularly in a mining pit have a certificate from the Mining Safety and Health Administration. About 60 to 70 percent of the drivers have the certificate, although there is no evidence that the Employer requires it as a condition of a driver's employment.¹⁰ The record is silent as to what

¹⁰ Only 15 of 100 operators have the MSHA certificate, and no laborers do.

competency certificates or previous job experience other than the class B commercial driver license the Employer requires as a condition of hiring.

Drivers, operators, and laborers are all hourly paid based upon time records that they create themselves by either completing a timecard manually or entering information via computer. The Employer offered an exhibit setting forth wage ranges for drivers as \$11.00 to \$16.44, averaging \$13.02; for operators, \$10.00 to \$22.50, averaging \$15.69; and for laborers, \$9.36 to \$15.00, averaging \$12.76.¹¹ Workers receive their same wage rate even if they work in a different job classification (except when they work on jobs subject to the prevailing wage provisions of the Davis-Bacon Act). Uniforms are optional for all classifications.

Employees in the three classifications in question receive the same insurance, vacation benefits, and perquisites such as employee discounts, invitations to Employer-sponsored social events, and year-end bonuses.¹² They have the same pay day and pay period. No distinction is drawn based on job classification in respect to break and lunch rules, parking, and storage areas. All employees are covered by the same handbooks on safety, substance abuse, and other rules and policies.

Resolution of unit composition issues begins with examination of the petitioned-for unit. If it is appropriate, the inquiry ends. If it is not appropriate, alternative units may be found. *Bartlett Collins Co.*, 334 NLRB No. 76, slip op. at 1 (July 11, 2001). The Board tries to select the smallest appropriate unit encompassing the petitioned-for employees. However, an overall unit may be the only appropriate one if there is no basis for a smaller grouping. *A. C. Pavement Striping Co.*, 296 NLRB 206 (1989).

The appropriateness of a particular set of employees normally depends upon community-of-interest factors such as mutuality of interest in wages, hours, and working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange; and functional integration. *Bartlett Collins*, supra; *Ore-Ida Foods*, 313 NLRB 1016 (1994). The Board need find only *an*, not the *most*, appropriate unit. *Morand Bros. Beverage Co.*, 91 NLRB 409, 419 (1950), enfd. on other grounds 190 F.2d 576 (7th Cir. 1951). A union's desire is always a relevant, although not a dispositive, consideration. *E. H. Koester Bakery & Co.*, 136 NLRB 1006 (1962).

The drivers at issue display a unity of interest with other classifications. Even without Employer Exhibit 4, on which I place little reliance due to its acknowledged flaws, there is evidence of significant cross-classification work. Although the exact frequency is in question,

¹¹ This data is uncontradicted but somewhat misleading. The numbers include the presumably higher wages paid to operator/foremen and exclude the wages of the four most highly paid laborers.

¹² The formula for computing the size of bonuses was unexplored. It cannot be on the basis of written employee evaluations, which the Employer does not use.

employees classified as drivers are regularly called upon to operate heavy equipment, while operators and laborers regularly drive trucks. At the four satellite locations, drivers, operators, and laborers are commonly supervised by plant managers. At Traverse City, immediate supervision is separated, with drivers reporting to dispatchers, and operators and laborers reporting to operator/foremen. However, operator/foremen report to dispatchers, dispatchers schedule employees in the three classifications, and product division plant managers oversee all. All employees are hourly paid, enjoy the same benefits, and are subject to the same rules and policies. The same centralization obtains with respect to discipline, hiring, and firing decisions, which are made by President Broad with input from other upper level managers.

Petitioner urges in its brief that the question of partitioning the petitioned-for drivers into a separate unit should be analyzed using craft-unit principles. In *Burns & Roe Services Corp.*, 313 NLRB 1307, 1308 (1994), the Board defined a craft unit as a distinct and homogeneous group of skilled, journeyman craftsmen who, together with helpers or apprentices, are primarily engaged in the performance of tasks that are not performed by other employees and which require the use of substantial craft skills and specialized tools and equipment. In finding a craft unit appropriate, the Board looks to the employees' participation in formal training or apprentice programs, lack of functional integration or overlap of duties, and assignments based upon craft or jurisdictional lines rather than need or expedience. *Id.* Discussion of the propriety of a craft or departmental unit may arise when a union seeks to sever a craft from an existing represented group, *Mallinckrodt Chemical Works*, 162 NLRB 387 (1967), or when it petitions for initial establishment of a unit and there is no bargaining history on a more comprehensive basis. *E. I. Du Pont & Co.*, 162 NLRB 413 (1966).

Petitioner correctly states in its brief that a degree of fungibility between classifications need not defeat a craft finding. E.g. *Hychem Constructors*, 169 NLRB 274 (1968). However, in *Hychem*, the sought pipefitters and welders had separate supervision, higher wages, on-the-job training, and departmental progression, factors not present here. Moreover, the unit of pipefitters and welders was being requested by a union, the United Association of Plumbers and Pipefitters, that traditionally represented workers in the sought trades. Symmetry between the petitioner and the craft of the sought employees is an explicit rationale in carving a craft unit. E.g. *Hydro Constructors*, 168 NLRB 105, 106 (1967) (identity of petitioner mentioned as factor in granting Laborers Union a unit of laborers separate from drivers and operators). See also *Dick Kelchner Excavating Co.*, 236 NLRB 1414 (1978) (separate units of operators and laborers accorded, respectively, to International Union of Operating Engineers and Laborers Union). In contrast, Petitioner here seeks not the operators but the drivers, workers with which it is not traditionally associated.

Although craft severance cases pose considerations not wholly applicable here, the reasoning of the cases is instructive. In *Wright City Display Mfg. Co.*, 183 NLRB 881 (1970) and *Downington Paper Co.*, 192 NLRB 310 (1971), the Board, on petitions by the International Brotherhood of Teamsters, granted self-determination elections to drivers who had been represented in production and maintenance units. In each case, drivers did no plant

work; did not load their trailers at the plant; were separately supervised; had minimal contact or interchange with plant employees; and unlike plant employees, were compensated by mileage and trip allowances rather than by hourly rates. In contrast, departmental severance was denied in *Olinkraft*, 179 NLRB 414 (1969), where drivers spent 20% of their time in non-driving tasks, received hourly rates, were overseen by plant supervisors, and were substituted by plant employees when necessary. The same holding resulted in *Dura-Containers*, 164 NLRB 293 (1967), where drivers and plant workers crossed department lines on the basis of seniority and drivers reported to the shipping foreman, helped shipping employees load trailers, worked in the plant 25% of their time, and received hourly compensation. See also *Dixie-Portland Flour Mills*, 186 NLRB 681 (1970) (drivers not granted severance election, despite having separate supervision, a different pay formula, no responsibility to load, and no interchange or contact with plant employees).

As in such cases as *Olinkraft* and *Dura-Containers*, the Employer pays its drivers by the hour and expects substantial crossover of work. That drivers operate heavy equipment and operators drive trucks when the need arises proves that their assignments honor expedience and practicality rather than traditional jurisdictional lines. The ability of the Employer's drivers, operators, and laborers to share each other's tasks is not surprising, given that the Employer levies the same job qualifications on all of them. The lack of special education or unique skills marking the drivers as separate also accounts for the freedom with which employees are able to transfer between classifications at their request.

I find, based on the above, that the drivers are not a distinct, homogeneous group. Instead, I find that their skills, functions, compensation, benefits, and lines of supervision so closely resemble those of the operators and laborers that a separate unit of drivers is not appropriate.

Accordingly, I find that the following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.¹³

¹³ As the unit found appropriate herein is larger (238) than the unit requested (106), the Petitioner is accorded a period of 10 days from the date of this Decision and Direction of Election in which to submit to the undersigned an additional showing of interest. In the event the Petitioner does not wish to proceed with an election, it may withdraw its petition without prejudice by notice to the undersigned within 7 days from the date of this Decision and Direction of Election.

All full-time and regular part-time drivers, operators, and laborers employed by the Employer at and out of its facilities at 3600 Rennie School Road, Traverse City, Michigan; 20248 19 Mile Road, Big Rapids, Michigan; 2775 West U.S. 10, Ludington, Michigan; 1200 Caberfae Highway, Manistee, Michigan; and 1231 East 16th Street, White Cloud, Michigan; but excluding dispatchers, plant managers, and guards and supervisors as defined in the Act, and all other employees.

Those eligible to vote shall vote whether they wish to be represented by Local 324, International Union of Operating Engineers, AFL-CIO.¹⁴

Dated at Detroit, Michigan this 6th day of November, 2001.

(SEAL)

/s/ William C. Schaub, Jr.

William C. Schaub, Jr., Regional Director
Region Seven
National Labor Relations Board
Patrick V. McNamara Federal Building
477 Michigan Avenue, Room 300
Detroit, Michigan 48226-2569

440-1760-6201

¹⁴ The parties stipulated that eligibility will be determined by standards in non-construction cases, rather than by the formula set forth in the line of cases under *Daniel Construction Co.*, 133 NLRB 264 (1961). The parties' stipulation not to apply the *Daniel* formula is permissible and hereby approved. *Ellis Electric*, 315 NLRB 1187 (1994). For the reasons set forth above in footnote 6, the operator/foremen may vote subject to challenge.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted under the direction and supervision of the undersigned among the employees in the unit(s) found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those employees in the unit(s) who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by:

LOCAL 324, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO

LIST OF VOTERS¹⁵

In order to ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969); *North Macon Health Care Facility*, 315 NLRB 359 (1994). Accordingly, it is hereby directed that **within 7 days** of the date of this Decision, **2** copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. The list must be of sufficient clarity to be clearly legible. The list may be submitted by facsimile transmission, in which case only one copy need be submitted. In order to be timely filed, such list must be received in the **DETROIT REGIONAL OFFICE** on or before **November 13, 2001**. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, Franklin Court, 1099 14th Street N.W., Washington D.C. 20570**. This request must be received by the Board in Washington by: **November 20, 2001**.

Section 103.20 of the Board's Rule concerns the posting of election notices. Your attention is directed to the attached copy of that Section.

¹⁵ If the election involves professional and nonprofessional employees, it is requested that separate lists be submitted for each voting group.